MORGAN PERUMAL

v.

K/I HUSSEIN ABDUL MAJID & ORS

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CRIMINAL APPEAL NO: J-05-51-1996]
20 JANUARY 1997

PREVENTIVE DETENTION: *Detention order - Detention under Emergency (Public Order And Prevention of Crime) Ordinance 1969 - Section 4(1) - Whether embodies two distinct and separate limbs - Doubt as to which particular limb Minister applied his mind to - Allegations of fact pointed to second limb while printed order was couched in terms of first limb - Whether detainee should have the benefit of the doubt - Whether powers of preventive detention must be strictly interpreted*

PREVENTIVE DETENTION: *Detention order - Detention under Emergency (Public Order And Prevention of Crime) Ordinance 1969 - Proximity of time - Whether there can be a long lapse of time between date of detention order and date of past criminal activities - Whether time lapse must be explained*

The appellant was arrested under the Emergency (Public Order And Prevention of Crime) Ordinance 1969 ('the Ordinance') on 13 January 1996. By an order dated 12 March 1996, the Deputy Minister of Home Affairs ('the Minister') ordered the appellant to be detained for a period of two years under s. 4 of the Ordinance. The appellant's application by notice of motion to the High Court for a writ of *habeas corpus* was dismissed; hence the instant appeal. Before the instant court, the primary ground of appeal was that detention was invalid in that the detention order was, on the face of it, vague as to whether the Minister had actually applied his mind to the particular circumstances of the case, or whether he had exercised his powers of detention mechanically. The appellant also argued that there was a long and unexplained delay between the dates of his alleged criminal activities and that of the detention order; the criminal activities being alleged to have occurred between August 1993 and April 1994 while the detention order was dated 12 March 1996.

Held:
Per Shaik Daud Ismail JCA

[1] Section 4(1) of the Ordinance embodies **two** distinct limbs: (i) preventing any person from acting in any manner prejudicial to public order; or (ii) it is necessary for the suppression of violence or the prevention of crimes involving violence. It was the clear intention of the Legislature to confer upon the Minister the power to issue a detention order based on any, or on both, of the two limbs; and, that there be a distinction between the first and second limbs.

[1a] If there appears to be a doubt as to which particular limb the Minister has applied his mind to, or whether he has applied his mind at all, then the detainee must be given the benefit of the doubt. There is no room for applying a liberal interpretation in interpreting the powers of preventive detention; they must be strictly interpreted.

[2] All the allegations of fact which formed the basis of the appellant's detention pointed unequivocally to acts of violence and the use of dangerous weapons by the appellant. These allegations fell squarely within the second limb of s. 4(1) of the Ordinance. However, the printed detention order was couched in terms of the first limb of s. 4(1) of the Ordinance with the second limb of s. 4(1) deliberately obliterated therefrom. It was, therefore, obvious that the Minister had not applied his mind properly in issuing the detention order and had acted mechanically in doing so. For this reason alone the appellant's appeal must be allowed.

[3] Whilst it is generally accepted that detention orders are issued based on past criminal activities, nevertheless, the date of the detention order must be proximate in time to these activities for it to be valid. In the present case, the alleged criminal activities of the appellant were far too remote in point of time to justify his detention, particularly when the long lapse of time was unexplained.

[Appeal allowed; writ of habeas corpus issued.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu telah ditahan di bawah Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('Ordinan tersebut') pada 13 Januari 1996. Melalui satu perintah bertarikh 12 Mac 1996, Timbalan Menteri Hal Ehwal Dalam Negeri ('Menteri tersebut') telah memerintahkan supaya perayu ditahan bagi satu tempoh selama dua tahun di bawah s. 4 Ordinan tersebut. Permohonan perayu melalui notis usul kepada Mahkamah Tinggi untuk satu writ *habeas corpus* telah ditolak; dengan itu telah menyebabkan rayuan semasa ini. Di hadapan mahkamah semasa, alasan rayuan utama adalah bahawa penahanan adalah tidak sah iaitu perintah penahanan telah, pada permukaannya, tidak jelas mengenai samada Menteri telah sebenarnya memikirkan keadaan-keadaan khususnya akan kes tersebut, atau samada beliau telah melaksanakan kuasa penahanannya secara mekanikal. Perayu juga berhujah bahawa adanya kelewatan yang agak panjang dan tidak diperjelaskan antara tarikh-tarikh aktiviti-aktiviti jenayah beliau yang dikatakan dan perintah penahanan tersebut; aktiviti-aktiviti jenayah yang didakwa telah berlaku antara bulan Ogos 1993 dan April 1994 sedangkan perintah penahanan bertarikh 12 Mei 1996.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Seksyen 4(1) Ordinan tersebut merangkumi dua bahagian: (i) mencegah mana-mana orang daripada bertindak dalam apa-apa cara yang memudaratkan ketenteraman awam; atau (ii) ianya penting untuk menyekat keganasan atau pencegahan jenayah yang melibatkan keganasan. Ianya merupakan niat jelas Perundangan untuk menganugerahkan ke atas Menteri tersebut kuasa untuk mengeluarkan satu perintah penahanan berdasarkan mana-mana atau kedua-dua bahagian tersebut; dan bahawa hendaklah terdapat satu perbezaan antara bahagian-bahagian pertama dan kedua.

[1a] Jika terdapatnya keraguan berhubung dengan bahagian tertentu yang mana telah difikirkan oleh Menteri tersebut, atau samada beliau telah memikirkannya sama sekali, maka orang tahanan itu seharusnya diberi kemanfaatan akan keraguan tersebut. Ianya telah secara konsistennya diputuskan oleh mahkamah-mahkamah bahawa tiada peluang untuk menggunakan pentafsiran liberal dalam mentafsirkan kuasa-kuasa penahanan pencegahan; ianya mesti ditafsirkan dengan tegasnya.

[2] Kesemua dakwaan fakta yang membentuk asas penahanan perayu dengan cara yang tidak boleh disangkal menunjukkan perbuatan-perbuatan keganasan dan penggunaan senjata merbahaya oleh perayu. Dakwaan-dakwaan ini jelas terlingkung dalam bahagian kedua s. 4(1) Ordinan

tersebut. Walaubagaimanapun, perintah penahanan bercetak telah disebut menurut bahagian pertama s. 4(1) Ordinan tersebut dengan bahagian kedua s. 4(1) dengan sengaja dihapuskan daripadanya. Ianya dengan itu, jelas bahawa Menteri tersebut telah tidak memikirkan dengan betul ketika mengeluarkan perintah penahanan tersebut dan dalam melakukan sedemikian telah bertindak secara mekanikal. Atas alasan ini semata-mata rayuan perayu seharusnya dibenarkan.

[3] Sementara adalah pada umumnya diterima bahawa perintah-perintah penahanan adalah dikeluarkan berdasarkan aktiviti-aktiviti jenayah yang lalu, namun begitu, tarikh perintah penahanan semesti tepat dengan masa aktiviti-aktiviti ini untuk ianya menjadi sah. Dalam kes semasa, aktiviti-aktiviti jenayah perayu yang didakwa adalah terlalu jauh menurut masa bagi mewajarkan penahanannya, khususnya apabila perluputan tempoh begitu lama telah tidak dijelaskan.

[Rayuan dibenarkan; writ habeas corpus dikeluarkan.]

Cases referred to:

Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lan [1993] 3 MLJ 673 ***(foll)***
Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor & Other Appeals [1990] 2 MLJ 297 ***(foll)***
PP v. Koh Yoke Koon [1988] 2 MLJ 301 ***(foll)***
Yeap Hock Seng v. Minister for Home Affairs [1975] 2 MLJ 279 ***(foll)***
Yip Hon Kit & Anor v. Minister of Home Affairs, Malaysia & Anor [1988] 2 MLJ 638 ***(foll)***

Legislation referred to:

Emergency (Public Order And Prevention of Crime) Ordinance 1969, s. 4(1)

For the appellant - RR Mahendran; M/s RR Mahendran & Co
For the respondent - Mohamad Abazafree Mohd Abas FC

[Appeal from High Court, Johor Bahru; Criminal Application No: 44-5-1996]

Reported by Alex KC Lee

JUDGMENT

Shaik Daud Ismail JCA:

On 13 January 1996, at about 2.40am appellant was arrested by 1st respondent purportedly under the Emergency (Public Order And Prevention of Crime) Ordinance 1969, (hereinafter referred to as "the Ordinance"). He was arrested at the Sultanah Aminah Hospital while he was receiving treatment for injuries sustained in a road accident. Eventually by an order dated 12 March 1996, the Deputy Minister for Home Affairs purportedly acting under s. 4(1) of the Ordinance, ordered the appellant to be detained for a period of two years.

By a notice of motion dated 12 February 1996, the appellant applied to the Johor Bahru High Court for a writ of *habeas corpus* for his release which application was dismissed, hence this appeal.

The main ground of this appeal is that the detention is invalid, in that on the face of it the order is vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of the case or whether he had exercised his powers of detention mechanically. Section 4(1) of the Ordinance provides that:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner ... prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years.

On a true reading of s. 4(1) above, it seems clear that there are two distinct limbs namely:

(a) a person who has acted in any manner prejudicial to public order; and

(b) a person, if it is necessary for the suppression of violence or the prevention of crimes involving violence.

It is clear that the legislature intended in s. 4(1) of the Ordinance to confer power on the Minister to issue a detention order based on any of the above two grounds or for that matter, on both the grounds. It also seems clear to us that it was intended by the legislature that there be a clear distinction between the first and the second limbs of s. 4(1) of the Ordinance. Mr. Ranjit Singh counsel for the appellant, submitted that if there appears to be any doubt as to the particular limb the Minister applied his mind to, or whether he applied his mind at all, the detainee must be given the benefit of the doubt. We agree with this submission. Our courts have consistently held that when it comes to interpreting powers of preventive detention, there is no room for giving these powers a liberal interpretation. When it comes to interpreting powers of preventive detention, it must be interpreted strictly.

In *PP v. Koh Yoke Koon* [1988] 2 MLJ 301 Hashim Yeop A. Sani CJ (as he then was) held that the law of preventive detention must be construed strictly and in the case of doubt the court should lean in favour of the subject. -

In *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and Other Appeals* [1990] 2 MLJ 297 Hashim Yeop A. Sani CJ (as he then was) – delivering the judgment of the Supreme Court again emphasises at p. 299:

> We are conscious of the government's effort to combat the drug menace in this country. But there is a fundamental principle involved here. The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Where detention law and the liberty of the individuals are concerned, this is the most correct approach for the courts to apply. There is hardly any need to repeat what has been said on the principle to be followed by the courts in dealing with detention law.

In the light of these decisions we now have to look into whether the Deputy Minister had actually applied his mind to the particular circumstances of this case or whether he had exercised his powers mechanically as claimed by the appellant.

It is submitted on behalf of the appellant that the facts adduced in the allegations upon which the detention order was sought and made, show that all of them involve acts of violence and the use of dangerous weapons.

Therefore, it seems clear that all these allegations fall squarely on the 2nd limb of s. 4(1) of the Ordinance. On our perusal of the allegations which formed the basis of the detention order, we agree that all of them, involved acts of violence, for instance on 28 August 1993 appellant was alleged to have been armed with an iron pipe and had attacked and injured an individual at a children's park. On 16 September 1993 he had allegedly physically attacked an individual at a pig farm. It cannot be gainsaid that all the allegations were acts of violence and the use of dangerous weapons. Therefore, they must fall squarely within the 2nd limb of s. 4(1) of the Ordinance. The order issued by the Deputy Minister in this case was in the following terms:

> Bahawasanya saya, berpuashati yang perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan hendak menegah beliau daripada melakukan perbuatan dengan apa-apa cara yang memudaratkan ketenteraman awam ...

The second limb of the printed order was deliberately obliterated. Reading the order as stated above it is obvious that the Deputy Minister must have only applied his mind to the 1st limb of s. 4(1) of the Ordinance when he issued the order. On our reading of the order as stated above, it seems obvious to us that the appellant was being detained "to prevent him from acting in any manner prejudicial to public order". The allegations upon which the Deputy Minister based his order all unequivocally point to acts of violence and the use of dangerous weapons which clearly fall on the 2nd limb of s. 4(1) of the Ordinance. Can it, therefore, be said that the Deputy Minister properly applied his mind, as the learned Senior Federal Counsel would have us believe. Therefore, we find no difficulty in holding that the deletion of the 2nd limb

in the detention order lends credence to the assertion that the Deputy Minister in this case had not applied his mind properly when he issued the detention order. He has, therefore, acted in a mechanical manner. In *Menteri Hal Ehwal Dalam Negeri & Anor. v. Lee Gee Lan* [1993] 3 MLJ 673, L.C. Vohrah J in delivering the judgment of the Supreme Court on the same issue concluded at p. 678 thus:

> We would conclude by saying that in determining the propriety or legality of the detention order made under s. 4(1) the satisfaction of the Minister has to be considered in the light of the limbs under which he acted. The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both of the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

In the present case, it is abundantly clear to us that the Minister applied his mind to the 1st limb of s. 4(1) of the Ordinance, while all the facts contained in the allegations were focussed on the 2nd limb. For this reason alone this appeal ought to be allowed.

It is also contended that there was a long delay or a large gap between the dates of the criminal activities alleged against the appellant, and the date of the detention order. From the list of allegations upon which the Deputy Minister based the detention order, it would appear that all the alleged criminal activities occurred from Aug. 1993 until about April 1994 but the detention order was only issued in March 1996. There is, therefore, a gap of some two years. No one sought to explain this long delay. While it is not disputed that generally detention orders are issued based on past criminal activities but those activities must be proximate to the date of the detention order to justify its validity. In *Yeap Hock Seng v. Minister for Home Affairs* [1975] 2 MLJ 279, there was a similar delay of some four and a half months. Abdoolcader J (as he then was) commented that:

> The past activities should, however, ordinarily be proximate in point of time to justify the detention.

In *Yip Hon Kit & Anor. v. Minister of Home Affairs, Malaysia & Anor.* [1988] 2 MLJ 638 when the criminal activities alleged were in the years 1983 and 1984 while the detention order was issued in February 1986, Edgar Joseph Jr. J (as he then was) at p. 647 held that:

> Accordingly, I hold that the criminal activities alleged against the applicant are too remote in point of Law to justify the detention order.

In the present case, as mentioned earlier the criminal activities of the appellant were some two over years from the date of the detention order. In the absence of any explanation, we would also hold that they are far too remote to justify the detention.

For the above reasons, we allowed the appeal, issued *habeas corpus*, and ordered the appellant to be released forthwith.